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The Honorable William F. Galvin
Secretary of the Commonwealth of Massachusetts
Regulations Division
State House, Room 117
Boston, MA 02133

RE: Proposed Regulation 940 C.M.R. 33.00

Dear Secretary Galvin:

Pursuant to M.G.L. c. 30A, § 5, an agency must file an amended Small Business Impact Statement ("Statement") prior to adoption of proposed regulations. The Attorney General's Office ("AGO") submits the following Statement for 940 C.M.R. 33.00: Earned Sick Time.

The AGO promulgates 940 C.M.R. 33.00 pursuant to M.G.L. c. 149, § 148C. The law, approved by the voters on November 4, 2014, permits the AGO to adopt regulations necessary to carry out the purpose and provisions of M.G.L. c. 149, § 148C. The regulations promulgated by the AGO will provide clarity as to how the law operates, to ensure that employees, including those at small businesses, can access earned sick time.

1. Estimate the number of small businesses subject to the proposed regulation.

According to the U.S. Small Business Administration ("SBA"), there are 615,000 small businesses in Massachusetts. These small businesses employ 1.4 million workers. Effective July 1, 2015 the law will require small businesses in the Commonwealth to allow their employees to accrue and use up to 40 hours of earned sick time on an annual basis.

Consistent with the law, small businesses with fewer than 11 employees must allow employees to earn and use sick time that is unpaid; businesses with 11 or more employees must allow employees to earn and use sick time that is paid.

The law authorizes the AGO to address the question of how to determine employer size in its regulations. The regulations promulgated by the AGO will assist small businesses in calculating whether they must allow employees to earn sick time that is paid or unpaid. Notably, the SBA reports that 119,000 Massachusetts small businesses reported having between 1-19 employees.

For businesses, including global companies, that have operations in multiple states and countries, the regulations clarify that employers count all employees inside and outside of Massachusetts in determining whether the earned sick time will be paid or unpaid. However, the regulations only entitle an employee to access the earned sick time law if the employee's principal place of work is Massachusetts.

The regulations inform small businesses on how to comply with provisions of the law, including: (1) how to determine accrual and use of earned sick time by an employee after a break in service; (2) how to determine earned paid sick time rates of pay; (3) the minimum amount of earned sick time that an employee can use; (4) procedures where an employer must call in a replacement employee; (5) circumstances where payouts for unused earned sick time are permissible; (6) compliance with the law through the end of calendar year 2015; (7) notice and documentation that employees must provide, including for employees 17 and under; (8) whether an employer's existing leave plan can meet the requirements of the law; (9) permissible good attendance and holiday pay policies; and (10) recordkeeping.

2. What are the projected reporting, recordkeeping and other administrative costs required for compliance with the proposed regulation?

The purpose of the law approved by the voters is to require employers, including small businesses, to allow employees to earn and use sick time. Compliance with the law is mandatory for all small businesses. Thus, regulations promulgated by the AGO to carry out the purpose and provisions of M.G.L. c. 149, § 148C will impact all small businesses. The regulations are intended to minimize the impact on small businesses, while balancing employees' rights to earned sick time.

A small business that on May 1, 2015 offered paid time off to its employees, and meets the minimum requirements of the AGO's safe harbor provision, will have until January 1, 2016 to adjust existing payroll policies consistent with the requirements of 940 C.M.R. 33.00 and M.G.L. c. 149, § 148C. More information about this deadline for compliance is available at <http://www.mass.gov/ago/docs/workplace/earned-sick-time/est-safe-harbor.pdf>.

A small business that does not offer time off will have to establish an earned sick time or paid time off policy, and may need to establish new procedures that comply with 940 C.M.R. 33.00 and M.G.L. c. 149, § 148C.

Small businesses required to provide earned paid sick time must pay all of their employees their same hourly rate when using sick time. The regulations establish how a small business must calculate the same hourly rate for an employee, including employees who are compensated using alternative methods. In no case, however, can the wage be less than the Massachusetts minimum wage.¹

¹ The minimum wage on the Earned Sick Time law's effective date of July 1, 2015 will be \$9.00 per hour. More information about the minimum wage is available at <http://www.mass.gov/ago/doing-business-in-massachusetts/labor-laws-and-public-construction/wage-and-hour/minimum-wage-bulletin.html>.

Small businesses must post a notice of the law prepared by the AGO in a conspicuous location. The notice includes information about employee and employer rights, obligations and protections. It also includes resources for employers and employees. Questions may be directed to earnedsicktime@state.ma.us, or by calling the AGO's Fair Labor Division at 617.727.3465.

Employers, including small businesses, must continue to comply with laws governing maintenance of employee records.² As required by M.G.L. c. 149, § 148C, the AGO's regulations address how those records must accommodate the accrual and use of earned sick time. Employers must maintain such records for three years. Employers are not obligated to report to the AGO, but current wage and hour laws authorize the AGO to request and obtain employee records.

More information about the law and regulations is available at www.mass.gov/ago/earnedsicktime. Information about other Massachusetts wage and hour protections is available at <http://www.mass.gov/ago/doing-business-in-massachusetts/labor-laws-and-public-construction/wage-and-hour/>.

3. Detail the appropriateness of performance standards versus design standards.

Neither performance standards nor design standards are applicable to the proposed regulatory changes.

4. Identify the regulations of the promulgating agency, or of another agency or department of the Commonwealth, which may duplicate or conflict with the proposed regulation.

Three Massachusetts laws currently provide employees with the ability to take leave from work.

Under the Small Necessities Leave Act, businesses with 50 or more employees must grant qualifying employees up to 24 hours of unpaid leave during any 12-month period to participate in school activities, or to attend a child or elderly relative's routine medical appointment.³ Similarly, M.G.L. c. 149, § 148C permits employees to take sick leave to attend medical appointments for the employee or for a close family member of the employee.

The AGO ensures compliance with the Small Necessities Leave Act. Additional information about the law, including an advisory, is available at: <http://www.mass.gov/ago/doing-business-in-massachusetts/labor-laws-and-public-construction/wage-and-hour/small-necessities-leave.html>

Under the Parental Leave Act, businesses with six or more employees must provide eight weeks of unpaid parental leave for the purpose of giving birth or for the placement of a child under the age of 18, or under the age of 23 if the child is mentally or physically disabled, for adoption.⁴

² M.G.L. c. 151, § 15

³ M.G.L. c. 149, § 52D and 940 C.M.R. 20.00

⁴ M.G.L. c. 149, § 105D, 804 C.M.R. 3.00 and 804 C.M.R. 8.00

The Massachusetts Commission Against Discrimination ensures compliance with the Parental Leave Act. Additional information about the law, including an advisory, is available at: <http://www.mass.gov/mcad/maternity1.html>.

Under the Employment Leave for Victims and Family Members of Abusive Behavior law, businesses with 50 or more employees in Massachusetts must grant qualifying employees up to 15 days of paid or unpaid leave to address legal, medical or other issues directly related to the abusive behavior against the employee or family member of the employee.⁵ Similarly, M.G.L. c. 149, § 148C permits employees to take sick leave to address the psychological, physical or legal effects of domestic violence.

The AGO ensures compliance the Employment Leave for Victims and Family Members of Abusive Behavior law. Additional information about the law, including an advisory, is available at <http://www.mass.gov/ago/doing-business-in-massachusetts/labor-laws-and-public-construction/domestic-violence-and-abusive-situation-leave.html>.

An employer may require an employee to use leave concurrently, where the purposes for the leave under M.G.L. c. 149, § 148C and any of the preceding laws overlap. In all cases, employees utilizing earned sick time or other job-protected leave must be free from unlawful retaliation for the use of such time.

An employer may require an employee to use earned sick time concurrently with any leave taken under the Family and Medical Leave Act (“FMLA”). The U.S. Department of Labor enforces the FMLA. More information about the federal law is available here: <http://www.dol.gov/whd/fmla>.

5. Analyze whether the proposed regulation is likely to deter or encourage the formation of new businesses in the Commonwealth.

The AGO received numerous comments from small business owners during the public comment period for 940 C.M.R. 33.00. Small businesses consistently expressed concerns to the AGO about compliance with the law, including costs to update payroll systems, calculate rates of pay, revise workplace policies, train and hire replacement employees and pay earned paid sick time. Businesses also expressed concerns about having to increase prices, or reduce payroll and other benefits to cover these increased costs. Participants in the hearing process also noted concerns about competition from businesses in other jurisdictions, and from businesses who would not comply with M.G.L. c. 149, § 148C.

During the comment period, the AGO also heard testimony about workers who lacked access to earned sick time. Testimony included examples of going to work sick, risking the health of the worker, coworkers and customers, and of sending a sick child to school because a parent could not afford to lose a day’s wages. The AGO recognizes the importance of ensuring these workers have access to earned sick time.

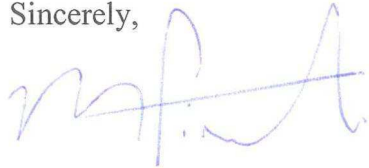
The open and collaborative process relied upon by the AGO is intended to draft clear and workable regulations, so that new businesses in Massachusetts will have clarity about their

⁵ M.G.L. c. 149, § 52E

obligations under the earned sick time law. While the comment period for the regulations closed on June 10, 2015, the AGO will continue to be a resource as small businesses implement the earned sick time law and regulations. The AGO's Division of Community Engagement and the Fair Labor Division will work to educate businesses and employees about their new rights and responsibilities. The Fair Labor Division is also empowered to investigate complaints of non-compliance.

I submit this Small Business Impact Statement on behalf of the Attorney General pursuant to the requirements of G.L. c. 30A, § 5.

Sincerely,



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